

Attorney fees
11 USC § 506(b)

Jensen v. Marnie Manor Ltd. Civ No. 93-868-JO

In re Marnie Manor Ltd. Bk No. 392-33377-S11

12/3/93 J.Jones, partially reversing J. Sullivan

The district court reversed and remanded an order partially sustaining the debtor's objection to the attorney fees requested by an oversecured creditor. The bankruptcy court disallowed a portion of the fees because they were for bankruptcy related matters and therefore not recoverable under the case of In re Rubottom, 142 BR 407 (Bankr D. Or 1992). Judge Jones disagreed with the analysis in Rubottom, and held that a creditor is entitled to attorney's fees in bankruptcy litigation if the creditor satisfies the four elements of § 506(b):

1-it is an allowed secured claim; 2- the creditor is "oversecured;" 3-the fees are "reasonable" under the circumstances; and 4-the fees are provided for under the agreement.

The claim was remanded to the bankruptcy court for more specific findings on the reasonableness of a portion of the fees.

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U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEC - 3 1993 10th 11/93

TERENCE H. DUNN, CLERK

BY WJ DEPUTY *ode*

ROBERT A. JENSEN,

Appellant,

v.

MARNIE MANOR LTD,

Appellee.

Civil No. 93-868-JO

OPINION AND ORDER

Michael J. Gentry
TOOZE MARSHALL SHENKER HOLLOWAY & DUDEN
333 S.W. Taylor Street
Portland, OR 97204

Attorneys for Appellant

Don Thacker
MORSE & BRATT
1111 Main Street
Post Office Box 61566
Vancouver, WA 98666

Attorneys for Appellee

JONES, Judge:

This matter is before the court on appeal from an order of the United States Bankruptcy Court pursuant to 28 U.S.C. § 158. Jensen, a creditor in the action below, appeals the bankruptcy court's order denying a portion of its post-petition attorney's

Certified to be a true and correct
copy of original filed in my office.
Dated 12-3-93

By Donald M. Cinnamond, Clerk
Franky Deputy

Appellee Marnie Manor, Ltd. ("Marnie") owns and operates an apartment complex in Portland. Jensen held a trust deed in the property securing a \$500,000 promissory note; the trust deed was in second position behind a first mortgage in favor of Mortgage Investments, Inc.

Marnie owed a balloon payment of approximately \$533,000 to Jensen in December of 1991 and was unable to make the payment, causing Jensen to initiate foreclosure via trustee's sale. On May 19, 1992, Marnie filed a Chapter 11 petition, presumably to prevent foreclosure. Jensen filed a proof of claim for approximately \$600,000.

On May 21, the bankruptcy court held a case management conference, at which Marnie and Jensen were admonished to "keep down the legal costs." On August 4, 1992, Jensen filed a motion for relief from stay. The motion was not ruled upon; instead, Marnie and Jensen negotiated a stipulated order resolving the issue. Marnie ultimately obtained funds sufficient to pay Jensen in full.

The trust deed¹ and promissory note² between Marnie and

¹The fee provision in the trust deed reads as follows:

In the event that suit or action is instituted to foreclose this Trust Deed, or to enforce any of the provisions hereof, the prevailing party shall be entitled to such sum as a trial court, and the appellate court shall the case be appealed, may award to the prevailing party as reasonable attorney's fees in such suit or action and the appeal thereof. In addition to attorney's fees and statutory costs, beneficiary shall also be entitled, in the event of a suit or action for foreclosure, to the reasonable costs of record searches, title reports and similar items.

Jensen each contained a provision for attorney's fees and costs. Presented with Jensen's claim for \$12,518.02 in post-petition fees and costs, the bankruptcy court allowed fees and costs totalling \$1,727.37 and denied the remaining claim for \$10,790.65. The bankruptcy court based its denial on In re Rubottom, 142 B.R. 407 (D. Or. 1992), but, recognizing that Rubottom may have been wrongly decided, made the following alternate ruling:

\$6,997.17 of the remaining fees and costs [\$10,790.65] are unreasonable, under In Re Puget Sound Plywood, 924 F.2d 955 (9th Circuit 1991), because \$3,293.99 is requested for advancing a Motion for Relief from Stay that was unreasonable and would not have been granted given the equity cushion in the collateral securing Jensen's claim, and \$3,703.18 is requested for arguing for allowance of the fees and costs incurred in advancing the Motion for Relief from Stay referred to above, which are post-petition bankruptcy-related fees and costs not recoverable under In Re Rubottom, 142 BR 407 (D OR 1992).

STANDARDS

"Bankruptcy court determinations regarding attorney's fees are reviewed for an abuse of discretion or erroneous application of the law." In re Alpine Group, Inc., 151 B.R. 931, 934 (9th Cir. BAP 1993). The district court reviews the bankruptcy

²The fee provision in the promissory note reads as follows:

In the event that litigation is instituted in respect to this Promissory Note the prevailing party shall be entitled to receive its reasonable attorney fees, at trial and on appeal, in addition to any other amounts that it is entitled to receive as a prevailing party by law, said amount to be set by the Court before which the matter is heard.

court's findings of fact for clear error and conclusions of law de novo. In re Daniels-Head & Associates, 819 F.2d 914, 917 (9th Cir. 1987).

DISCUSSION

A. In Re Rubottom

Jensen contends that In re Rubottom, 142 B.R. 407 (D. Or. 1992) (Hess, J.), relied upon by the bankruptcy court to deny \$10,790.65 of Jensen's requested fees and costs, is wrongly decided. I agree.³

Both parties agree that the facts in Rubottom do not differ significantly from the facts of the case at bar. Each case involves an oversecured creditor seeking an award of post-petition fees and costs. Each creditor filed a motion for relief from the bankruptcy stay which was not decided on the merits. Id. at 408. In each instance, the documents contained provisions for recovery of attorney's fees and costs.

In holding that the creditor was not entitled to an award of attorney's fees incurred in matters "'peculiar to bankruptcy,'" id. at 409, Judge Hess hurdled two sizeable barriers. First, 11 U.S.C. § 506(b) provides that an oversecured creditor "shall be allowed... any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." Second, the

³Marnie argues that this court does not have to reach the Rubottom issue in order to affirm the bankruptcy court, because of the bankruptcy court's alternate finding that \$6,997.17 of the \$10,790.65 in denied fees and costs is unreasonable. Unless Marnie intends to concede an additional award of \$3,793.48 to Jensen, however, Rubottom must be addressed.

overwhelming majority of courts facing the issue have ruled that post-petition fees and costs are available under § 506(b). See id. at 410 (citing Collier's on Bankruptcy, 15th ed., at 506-41-42, ¶ 506.05).

Based upon his reading of Ninth Circuit case law, however, Judge Hess felt compelled to reach a contrary result. Specifically, Judge Hess felt that the cases of In re Fulwiler, 624 F.2d 908 (9th Cir. 1980), In re Coast Trading Co., 744 F.2d 686 (9th Cir. 1984), In re Johnson, 756 F.2d 738 (9th Cir. 1985), and In re Fobian, 951 F.2d 1149 (9th Cir. 1991) require that such post-petition fees and costs be denied. Each of those cases states a blanket rule that "where the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law, attorney fees will not be awarded absent bad faith or harassment by the losing party." Fobian, 951 F.2d at 1153. I respectfully disagree with Judge Hess' analysis. None of the cases relied upon in Rubottom involves the application of § 506(b).

In re Fulwiler involved a debtor seeking to recover attorney's fees against a creditor, pursuant to state law, for successfully defending a nondischargeability action. Similarly, In re Coast Trading involved a debtor and an unsecured creditor seeking to recover attorney's fees pursuant to state law, and In re Fobian involved an undersecured creditor. Clearly debtors, unsecured creditors and undersecured creditors have no claim for fees under § 506(b), which applies only to oversecured creditors,

and the Ninth Circuit did not discuss the irrelevant code provision in any of the above cases.

In re Johnson also involved debtors seeking fees. The Johnson court specifically rejected the debtors' argument that, because the creditor against whom they had successfully litigated a motion for relief from stay may have been able to recover fees under § 506(b), the debtors should be allowed to recover under the state statute in question:

This argument is inapposite. Section 506(b) concerns only the award of attorney's fees to oversecured creditors with a contractual right to reimbursement and is not applicable to the [debtors].

756 F.2d at 741 n.3. Thus, the Johnson court explicitly recognized that its holding did not address § 506(b).

While the Ninth Circuit has yet to deal specifically with an oversecured creditor,⁴ the Ninth Circuit Bankruptcy Appellate Panel has. In In re Alpine Group, Inc., 151 B.R. 931 (9th Cir. BAP 1993), the BAP overruled both the holding of Rubottom and its interpretation of Fobian, Johnson, Coast Trading and Fulwiler. Id. at 934-35. The BAP concluded that the cases relied upon in Rubottom

merely restate what is known as the American rule, that in absence of a specific statute awarding attorney's fees, each party bears its own costs in litigation. Here, however, there is a specific provision in the bankruptcy code that allows for the payment of

⁴In Matter of 268 Ltd., 789 F.2d 674 (9th Cir. 1986), the Ninth Circuit addressed the reasonableness of the amount of an award made pursuant to § 506. The threshold question of the statute's applicability to fees incurred in bankruptcy proceedings was not an issue on appeal. However, the fees involved were incurred in bankruptcy proceedings.

attorney's fees. Section 506(b) allows for "any reasonable fees ... provided for under the agreement...."

Id. at 934. The BAP held that post-petition fees "may be allowed under § 506 provided that the requirements of § 506(b) are met."

Id.

To summarize, an analysis of the Ninth Circuit cases relied upon in Rubottom reveals that the blanket rule against awarding attorney's fees in bankruptcy litigation does not extend to defeat the right provided oversecured creditors by § 506(b). Instead, a creditor is entitled to attorney's fees if the following four elements are satisfied:

1-it is an allowed secured claim; 2-the creditor is "oversecured;" 3-the fees are "reasonable" under the circumstances; and 4-the fees are provided for under the agreement.

Alpine Group, 151 B.R. at 934. There is no dispute in this case that the first two elements are met. I turn now to an analysis of the remaining two elements.

B. The Fee Provisions

Marnie cites several bankruptcy court decisions from the Eastern District of Pennsylvania which hold that fee provisions similar to the ones involved in this case do not extend to services performed to pursue a claim in bankruptcy. It is unnecessary to go so far away from home to find the answer to this issue, however, as it was resolved by the Ninth Circuit BAP in In re Salazar, 82 B.R. 538 (9th Cir. BAP 1987).

In Salazar, "[b]oth the note and the deed of trust provide[d] by their terms for the payment of attorney's fees by

the obligor in the event legal action is instituted on the note." 82 B.R. at 539 (emphasis added). The BAP found such provisions sufficient to provide for fees incurred in obtaining relief from the automatic stay. Id. at 540.

In this case, the fee provision in the deed extends to suits "instituted to foreclose this Trust Deed, or to enforce any of the provisions hereof", (emphasis added), and the note provides for fees "[i]n the event that litigation is instituted in respect to this Promissory Note." These provisions are substantially similar to the ones at issue in Salazar, and are broad enough to encompass bankruptcy proceedings.⁵

C. Reasonableness of Fees Incurred

Anticipating a possible reversal of his ruling based on Rubottom, Judge Sullivan issued alternate findings on the reasonableness of the fees requested. First, in addition to the \$1,727.37 originally awarded, Judge Sullivan found \$3,793.48 of the requested fees to be reasonable. There is no dispute over these fees, entitling Jensen to a minimum award of \$5,520.85.

Second, Judge Sullivan found \$3,293.99 of the fees to be unreasonable because they were incurred "for advancing a Motion for Relief from Stay that was unreasonable and would not have been granted given the equity cushion in the collateral securing Jensen's claim."

⁵Although Judge Sullivan did not explicitly state that the contract clauses cover the requested fees, such a finding is implicit in his alternate ruling that \$3,793.48 of the fees denied based on Rubottom represent a reasonable request.

It is well recognized that in reviewing any award for fees the bankruptcy court possesses inherent discretionary powers and "will consider such factors as whether the attorneys [sic] fees and costs were incurred in an action reasonably calculated to protect creditors' rights."

Salazar, 82 B.R. at 540 n.2. I find no abuse of discretion in the bankruptcy court's decision to deny these fees, nor clear error in the court's account of the evidence. The denial of \$3,293.99 of the total requested fees is affirmed.

Finally, Judge Sullivan held that \$3,703.18 of the fees are "post-petition bankruptcy-related fees and costs not recoverable under In re Rubottom" because they were incurred litigating Jensen's entitlement to the fees. This ruling is somewhat perplexing, considering the bankruptcy court's intent to provide rulings on bases alternative to Rubottom; however, no independent basis for finding the requested fees unreasonable is expressed. Therefore, I regretfully remand this matter to the bankruptcy court for a determination of the reasonableness of the \$3,703.18 requested.

D. Fees on Appeal


At oral argument, Jensen raised the issue of which court should determine whether Jensen is entitled to its fees incurred in this appeal. I find that Jensen has prevailed in this matter. On remand, the bankruptcy court shall determine the amount of fees to be awarded.

CONCLUSION

The decision of the bankruptcy court is REVERSED. Appellant is entitled to attorney's fees and costs in the amount of

\$5,520.85, and \$3,293.99 of the requested fees and costs are denied. This matter is REMANDED for a determination of the reasonableness of the remaining \$3,703.18 requested and for a determination of the fees to be awarded in conjunction with this appeal.

DATED this 2nd day of December, 1993.



ROBERT E. JONES
United States District Judge